A

PP

v.

PUNANESVARAN KESAVAN & OTHER CASES

B

HIGH COURT MALAYA, SHAH ALAM
KN SEGARA J
[CRIMINAL TRIAL NOS: 45-33-2007, 45-35-2007, 45-38-2007, 45-4-2007]
9 FEBRUARY 2007

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in dangerous drugs - Transfer of case by magistrate to High Court - Whether prior consent of Public Prosecutor required - Dangerous Drugs Act 1952, s. 41A*

D

CRIMINAL PROCEDURE: *Jurisdiction of court - Magistrate's court - Transfer of case - Trafficking in dangerous drugs - Whether prior consent of Public Prosecutor required for case triable exclusively by the High Court pursuant to s. 41A(1) Dangerous Drugs Act 1952*

E

CRIMINAL PROCEDURE: *Charge - Trafficking in dangerous drugs - Charge framed by Deputy Public Prosecutor without chemist report - Whether charge could be framed first pending availability of chemist report - Dangerous Drugs Act 1952, s. 39B(3)*

F

CRIMINAL PROCEDURE: *Prosecution - Institution of prosecution - Whether prosecution instituted when accused is called upon to plead to charge - Dangerous Drugs Act 1952, ss. 39B(1)(a), (3), (4), 41A(1)*

WORDS & PHRASES: *"... shall not be further prosecuted until the consent has been obtained ..." - Proviso to s. 39B(3) Dangerous Drugs Act 1952 - Interpretation of - Whether person can be remanded in custody until the consent of Public Prosecutor is obtained - PP v. Toha M Yusuf & Ors*

G

WORDS & PHRASES: *"Requisition" and "Consent" of Public Prosecutor - Interpretation of - Whether "Requisition" necessary for purpose of transmitting case not within exclusive jurisdiction of the High Court - Whether "consent" necessary for institution of prosecution - Dangerous Drugs Act 1952, s. 41A*

H

I

The four cases herein were drug related offences under s. 39B Dangerous Drugs Act 1952 ('DDA'). The Deputy Public Prosecutor ('DPP') applied for revision of the orders of the respective magistrates in transmitting the cases to the High Court pursuant to s. 41A DDA on the grounds that the said magistrates failed to remand the accused until the consent of the Public Prosecutor was obtained.

Held:

(1) The application for revision is without merit as the four cases transmitted by the magistrate have been registered for trial in the High Court and were proceeding in accordance with the law before the respective judges assigned to hear them. (para 8)

(2) When any notice is filed by the DPP in respect of any decision by a magistrate transmitting a case to the High Court, the magistrate shall not waste his or her time writing any grounds of decision and preparing a Record of Appeal. The Notice of Appeal shall be brought up before the judge in the presence of the DPP as soon as possible and shall be summarily disposed off. The order of transmission by a magistrate under s. 41A DDA does not fall within the definition of "decision" under s. 3 of the Courts of Judicature Act 1964 as the order does not finally dispose off the rights of the parties. Therefore, the said order shall not be subject of an appeal. (paras 10 & 11)

(3) The Public Prosecutor ('PP') has a legal and moral duty not to frame any charge under s. 39B DDA or any other section of the DDA if he is not in a position to ascertain the nature of the substance in the possession of the accused at the time the accused is first produced and charged before the magistrate. In any case, it is always open to the police in an appropriate case to invoke powers of preventive detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 (See ss. 3 & 6). (para 13)

(4) If the DPP continued to write in for a revision of any decision or order made by a magistrate consistent with the *ratio decidendi* of this court in *PP v. Marwan* without the DPP first pursuing in the proper forum to successfully reverse the said decision, the court might be compelled to

issue a show cause notice to the DPP as to why he should not be punished for contempt. Any attempt to harass and intimidate magistrates with futile letters to the High Court to have a decision or order of a magistrate revised would not be tolerated and would be considered contemptuous. (para 14)

(5) The offence of trafficking under s. 39B(1) DDA is an offence triable exclusively by the High Court. In law no subordinate court can call upon an accused to plead to the charge. Naturally and logically, therefore, s. 41A(1) DDA provides that in respect of an offence triable exclusively by the High Court, the accused person shall be produced before the appropriate subordinate court which shall after the charge has been explained to him, transmit the case to the High Court, and cause the accused to appear or brought before such court as soon as may be practicable *(PP v. Toha M Yusuf & Ors)*. (para 15)

(6) A prosecution is instituted within the meaning of s. 39B(3) DDA only when the accused is called upon to plead to the charge. However, there must be consent of the PP when the accused is called up to plead irrespective of what happened prior to that stage. Therefore, in respect of a charge under s. 39B(1) DDA, the question of obtaining the consent of the PP at the stage immediately prior to the transmission of the case is a non-issue as the accused cannot be called up to plead to the charge at that stage *(PP v. Toha M Yusuf & Ors)*. (para 15)

(7) An accused person can only be called to plead to the charge when he appears at the High Court pursuant to the provisions of s. 41A(1) DDA. When the accused is produced in the High Court upon the case being transmitted pursuant to s. 41A(1) DDA, the question of any consent (written or oral) of the PP to institute a prosecution under s. 39B is academic as his deputy always appears personally in the High Court and thus there is necessarily an implied consent to the prosecution *(PP v. Toha M Yusuf & Ors)*. (para 15)

(8) The last 11 words "… shall not be further prosecuted until the consent has been obtained …" in the proviso to s. 39B(3) DDA cannot be interpreted to mean to remand in custody any person indefinitely on the purported ground or pretext that the consent of the PP has not been obtained *(PP v. Toha M Yusuf & Ors)*. (para 15)

(9) The order for transmission of a case by a magistrate under s. 41A(1) DDA is a judicial act, statutorily authorised. The last 11 words of the proviso to s. 39B(3) DDA cannot be read and judicially interpreted in a manner that would interfere and obstruct the said judicial function of the magistrate under s. 41A(1) DDA *(PP v. Toha M Yusuf & Ors)*. (para 15)

(10) "Requisition" of the PP and "Consent" of the PP are two independent subject matters under the DDA. One should not be confused with the other. The "Requisition" of the PP is only necessary for the purpose of transmitting a case not within the exclusive jurisdiction of the High Court, *ie*, a case registered and scheduled for hearing either in the sessions court or magistrate court but nevertheless the PP in his wisdom requires such a case to be tried in the High Court (See ss. 41(1), 41(2) and 41A(1) DDA). The requisition of the PP to try a case under s. 39B(1) DDA is irrelevant and does not arise because such a case cannot in the first place be registered and scheduled for hearing either in the sessions court or the magistrate court under s. 41(1) DDA as the courts have no jurisdiction to try it. Therefore, there will never be a situation for the PP to require it to be tried in the High Court under s. 41(2) DDA *(PP v. Toha M Yusuf & Ors)*. (para 15)

(11) In deciding whether to transmit a case to the High Court, the magistrate should not be concerned with the chemist report. It is for the police and the PP to put their act together when charging an accused after the police have completed their investigations pursuant to any remand under s. 117 CPC. If the chemist report was not available to the police, the accused should not have been charged in the first place for an offence under the DDA without knowing the nature of the substance in his possession. The accused

A ought to be released under s. 29 CPC. It is clearly an abuse of the process of the law for the police or PP to frame a charge in the magistrate's court under s. 39B(1) DDA and then detain the accused in custody at the "prosecution's pleasure" without transmitting the case to the High Court
B for trial *(PP v. Marwan)*. (para 16)

[Magistrates' orders in transmitting the four cases to High Court were correct and legal].

C **Case(s) referred to:**
PP v. Marwan Ismail (Criminal Revision No: 43-18-2006) (Unreported) ***(refd)***
PP v. Toha M Yusuf & Ors [2006] 2 CLJ 800 HC ***(refd)***

Legislation referred to:
D Courts of Judicature Act 1964, s. 3
Criminal Procedure Code, s. 29
Dangerous Drugs Act 1952, ss. 39B, 41A
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 6

Reported by Usha Thiagarajah

E

JUDGMENT

KN Segara J:

F **[1]** I have been receiving undated letters from the Ketua Unit Pendakwaan Selangor, DPP Nik Suhaimi bin Nik Sulaiman, from as early as 23 January 2007 requesting for a revision of the order of the respective Magistrates in the State of Selangor transmitting
G any case to the High Court pursuant to s. 41A Dangerous Drugs Act 1952, in respect of a charge under s. 39B Dangerous Drugs Act 1952, on the grounds the Magistrate had failed to remand the accused until the consent of the Deputy Public Prosecutor (Public Prosecutor) to prosecute has been obtained. The first undated
H letter received on 23 January 2007 is reproduced in full for ease of comprehension:

I

PERMOHONAN SEMAKAN JENAYAH
BAGI KES DI MAHKAMAH MAJISTRET KLANG
KES NO. 81-41-06
PENDAKWARAYA LWN. MUHD ALI BIN HUSEN
(NO. RU. UNHCR: 354-04C09850)
PERTUDUHAN DIBAWAH SEKSYEN
AKTA DADAH BERBAHAYA 1952

Dengan hormatnya saya diarahkan untuk merujuk kepada perkara di atas kepada perhatian YA Dato' Hakim Utama Mahkamah Tinggi Jenayah (1) supaya semakan Jenayah dapat dilaksanakan berkaitan kes di atas.

2. Sebagai latar belakang:

2.1 Pada 22.12.2006, Tertuduh Muhd Ali bin Husen (No. Ruj. UNHCR: 354:O4C09850) telah dituduh di Mahkamah Majistret Klang bagi kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 (disebut selepas ini "ADB 1952")

2.2 Pertuduhan adalah seperti berikut:

Bahawa kamu pada 12.12.2006 jam lebihkurang 5.00 petang, bertempat di tepi jalan, Jalan Kebun Klang, di dalam Daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah Berbahaya iaitu anggaran berat 935 gram ganja dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

2.3 Pada 22.12.2006 di Mahkamah Majistret Klang, pertuduhan telah dibaca tanpa apa-apa pengakuan diambil dan Timbalan Pendakwa Raya yang hadir, Md Azar Irwan bin Moh. Arifin telah memohon satu tarikh sebutan untuk mendapatkan Laporan Kimia dan Izin.

2.4 Majistret Yang Bijaksana, Tuan Mujib bin Saroji telah mengeluarkan Perintah supaya kes ini dipindahkan ke Mahkamah Tinggi Shah Alam dan menetapkan tarikh 12.1.2007 sebagai tarikh sebutan di Mahkamah Tinggi.

2.5 Pada 12.1.2007, sebutan kes di Mahkamah Tinggi dijalankan di hadapan Yang Arif Pesuruhjaya Kehakiman Dato' Mohd Zaki bin Md Yasin, yang kemudiannya telah menetapkan tarikh 16.2.2007 sebagai tarikh sebutan semula untuk mendapatkan Laporan Kimia dan Izin.

A 3. Dengan izin YA Hakim Dato', pihak kami dengan penuh hormatnya berpendapat tindakan Majistret Yang Bijaksana terus memindahkan kes tanpa persetujuan atau Izin Pendakwa Raya sama ada secara tersirat atau tersurat adalah bertentangan dengan peruntukan Seksyen 39B(3) ADB 1952.

B Seksyen 39B(3) ADB 1952 menyebut (dengan izin):

> (3) A prosecution under this section shall not be instituted except by or with the consent of Public Prosecutor.
>
> C Provided that **a person may be arrested** or a warrant for this arrest may be issued and executed, and **any such person may be remanded in custody notwithstanding that the consent of that Public Prosecutor** to the institution of a prosecution for the offence **has not been obtained,** but the case shall not be further prosecuted until D the consent has been obtained.

4. Peruntukan Seksyen 39B(3) ADB 1952 adalah dengan jelas membenarkan seorang ditangkap dan direman dalam jagaan walaupun tidak ada pendakwaan dimulakan dan pendakwaan tidak boleh diteruskan tanpa Izin Pendakwa Raya diperolehi.

E 5. Sehubungan dengan itu, peruntukan Seksyen 39B(4) adalah terpakai bagi maksud sementara menunggu Izin Pendakwa Raya, seseorang boleh dibawa ke Mahkamah bagi pertuduhan diterangkan tanpa ada pengakuan diambil dan sehubungan dengan itu juga peruntukan undang-undang yang ada yang berkuatkuasa F pada waktu itu berkaitan dengan tatacara jenayah hendaklah terpakai dengan pengubahsuaian.

Seksyen 39B(4) ADB 1952 menyebut (dengan izin):

> G (4) When a person **is brought before a court** under this section **before the Public Prosecutor has consented** to the prosecution the charge shall be explained to him but he shall not be called upon to plead and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly.

H 6. Pada pendapat kami, pada ketika pertuduhan awal dibuat di hadapan Mahkamah Majistret, prosedur yang digunakan ialah sebagai mematuhi peruntukan Seksyen 39B(3) dan (4) ADB 1952. Pada peringkat ini, Pendakwa Raya tidak dapat memberikan izin sama ada untuk meneruskan pendakwaan di bawah Seksyen I 39B(1)(a) ADB 1952 atau tidak kerana laporan Kimia untuk mengesahkan jenis dadah dan berat dadah belum lagi diperolehi.

7. Dengan hormatnya kami berpendapat keputusan laporan Kimia mengenai jenis dadah dan berat adalah penting bagi menentukan bentuk kesalahan dan menentukan bidangkuasa Mahkamah mana yang harus membicarakan kes-kes yang melibatkan dadah Berbahaya.

Seksyen 41 ADB 1952 menyebut (dengan izin):

> (1) A Session Court or a Magistrate's Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, except an offence under section 39B, and power to impose for any offence so tried the full punishment or penalty provided for that offence by this Act or by any regulations made there under, other than, in the case of a Magistrate's Court, imprisonment exceeding five years.
>
> (2) Notwithstanding the provisions of subsection (1), the High Court shall have jurisdiction to try any case in respect of any offence under this Act if the Public Prosecutor requires any such case to be tried by High Court.
>
> (3) The provisions of subsections (1) and (2) shall have effect notwithstanding any other written law to the contrary.

8. Berpandukan kepada Seksyen 41 ADB 1952, kami berpendapat penentuan sama ada kes harus dibicarakan di Mahkamah Sesyen, Majistret atau Mahkamah Tinggi adalah bergantung kepada jenis kesalahan yang akan hanya ditentukan dengan muktamad berpandukan keputusan laporan Kimia.

9. Dalam hubungan ini, kami berpendapat telah berlaku kehilafan undang-undang oleh Puan Majistret Yang Bijaksana apabila terus memindahkan kes ke Mahkamah Tinggi sedangkan laporan Kimia tidak diperolehi untuk menentusahkan jenis kesalahan dan bidangkuasa Mahkamah mana yang harus mendengar kes tersebut.

10. Pihak kami juga berpendapat peruntukan Seksyen 41A ADB 1952 hanya terpakai apabila Pendakwa Raya telah menyatakan persetujuan atau Izin atau kehendak supaya kes itu dibicarakan di Mahkamah Tinggi iaitu apabila seseorang TPR yang hadir bagi pihak Pendakwa Raya memaklumkan kepada Mahkamah supaya kes dipindahkan ke Mahkamah Tinggi barulah Mahkamah Majistret boleh memindahkan kes itu ke Mahkamah Tinggi.

Seksyen 41A ADB 1952 menyebut (dengan izin):

> (1) Where any case in respect of an offence is triable exclusively by the High Court or under this Act is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such court as soon as may be practicable.
>
> (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial,
>
> (4) The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary.

11. Peruntukan Seksyen 41A ADB 1952 adalah merupakan peruntukan yang hampir sama dengan peruntukan seksyen 177A Kanun Tatacara Jenayah.

12. Pada pendapat kami seksyen 41A ADB 1952 adalah merupakan mekanisma tatacara yang terpakai apabila sesuatu kes atas persetujuan atau kehendak Pendakwa Raya untuk dibicarakan di Mahkamah Tinggi supaya keperluan perbicaraan awal (preliminary inquiry) dikecualikan dan bagi memenuhi keperluan seksyen 41A Akta yang sama seseorang itu hendaklah dibawa ke Mahkamah Rendah dengan secepat mungkin dan diterangkan untuk dibaca pertuduhan dan kes dipindahkan ke Mahkamah Tinggi.

13. Sehubungan dengan ini, pihak kami berpendapat telah berlaku kehilafan undang-undang oleh Puan Majistret Yang Bijaksana apabila terus memindahkan kes ke Mahkamah Tinggi sedangkan TPR yang hadir jelas memohon satu tarikh sebutan sementara menunggu Izin dan tidak pernah sekali-kali menyatakan persetujuan supaya kes dipindahkan ke Mahkamah Tinggi.

14. Pada pendapat kami, peruntukan Seksyen 39B(3) dan (4) dan 41A ADB 1952 hendaklah diberi interpretasi sepertimana Akta Dadah Berbahaya 1952 diwujudkan iaitu salah satu tujuannya adalah mengadakan peruntukan bagi perlaksanaan kuasa dan tugas statutory. Ini bermakna, jika peruntukan seksyen 39B(3) dan (4) membenarkan seseorang ditahan dalam kawalan sementara menunggu Izin Pendakwa Raya maka maksud peruntukan tersebut hendaklah diberi pengiktirafan (recognized) oleh Mahkamah Yang Mulia. Sehubungan dengan itu, dengan izin, kami berpendapat seksyen 17A Akta Tafsiran 1948/1967 adalah terpakai.

Seksyen 17A Akta Tafsiran 1948/1967 menyebut (dengan izin):

> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

15. Berpandukan keputusan kes-kes *PP v. An Kee Cheng & Anor Case* [2006] 5 CLJ, *PP v. Duis Akim & Ors* [2005] 6 MLJ 26, *PP v. Oladotum Lukman Umaru* [1991] 1 MLJ 187 dan *PP v. Lee Chan Sang* [1989] 1 MLJ 224 dan dibezakan dengan Penghakiman *PP v. Toha M Yusuf & Ors* [2006] 2 CLJ 800, kami berpendapat bahawa Perintah yang diberikan oleh Puan Majistret Yang Bijaksana tanpa terlebih dahulu mendapat Izin dari Peguam Negara adalah satu kehilafan undang-undang yang bertentangan dengan peruntukan Seksyen 39B(3) dan (4), seksyen 41, seksyen 41A ADB 1952 dan peruntukan Seksyen 177A Kanun Tatacara Jenayah.

16. Justeru itu, kami dengan rendah diri memohon pertimbangan YA Hakim Dato' agar membenarkan permohonan semakan jenayah ini agar semakan ini dapat dibuat dengan kadar segera.

17. Di atas kesudian YA Hakim Dato' meneliti permohonan kami ini, kami dahului dengan ucapan ribuan terima kasih.

Sekian, terima kasih.

BERKHIDMAT UNTUK NEGARA

Saya menurut Perintah,

t.t.
(Nik Suhaimi bin Nik Sulaiman)
Ketua Unit Pendakwaan
Selangor.

A s.k: 1) Y.Bhg. Dato' Ketua Bahagian Pendakwaan
Putrajaya.

2) Tuan Mujib bin Saroji
Majistret
Mahkamah Majistret Klang.

B

[2] The Timbalan Pendaftar replied on 25 January 2007 on my instructions as follows:

PERMOHONAN SEMAKAN JENAYAH
C BAGI KES DALAM MAHKAMAH MAJISTRET KLANG
KES TANGKAP NO: 81-41-2006
PENDAKWA RAYA – LAWAN – MUHD ALI BIN HUSEN

Perkara di atas dan surat tuan yang tidak bertarikh dan kami terima pada 24 Januari 2007 adalah dirujuk.
D

2. Permohonan tuan tersebut telah dibawa kepada perhatian Y.A. Hakim Utama Dato' K.N. Segara untuk pertimbangan beliau.

3. Dukacita dimaklumkan bahawa Y.A. Hakim berkenaan setelah meneliti permohonan tuan TIDAK berhasrat untuk menjalankan
E apa-apa semakan di dalam perkara ini dan menegaskan bahawa sehingga adanya keputusan yang berlainan daripada Mahkamah yang lebih tinggi, maka keputusan di dalam kes Pendakwa Raya – lawan – Marwan bin Ismail (Semakan Jenayah Mahkamah Tinggi Shah Alam No: 43-18-2006) adalah terpakai.

F

4. Untuk makluman tuan juga kes 81-41-2006 tersebut telah pun didaftarkan di Mahkamah Tinggi Jenayah (3) Shah Alam sebagai kes perbicaraan Jenayah No. 45-134-2006 dan ditetapkan untuk sebutan kali kedua pada 16 Februari 2007 di Mahkamah berkenaan.

G

Sekian, terima kasih.

BERKHIDMAT UNTUK NEGARA

Saya yang menurut Perintah,

H t.t.
(Rofiah bt Mohamad)
Timbalan Pendaftar
Mahkamah Tinggi Shah Alam.

I

[3] *PP v. Marwan bin Ismail* (Semakan Jenayah No. 43-18-2006) referred to by the Timbalan Pendaftar in her letter was disposed off on 8 December 2006 and a written judgment was handed to all parties the very same day. The accused was ordered to be produced forthwith before the magistrate and the magistrate directed to re-consider whether to transmit the case to the High Court, pursuant to s. 41A DDA or to discharge the accused and release him under s. 29 CPC, after hearing submissions, if any, from the DPP and the accused. I have received a report from the Timbalan Pendaftar as to the development and progress of the case from the date I made the order on Revision on 8 December 2006. The said report is reproduced below.

Ringkasan Perkembangan Kes Perbicaraan Jenayah No: MTJ(1) 45-123-2006

Pendakwa Raya Lawan Marwan bin Ismail (W/Indonesia)

1. OKT ditangkap/reman pada 20/11/2006 atas satu pertuduhan dibawah seksyen 39B(1) ADB 1952. Kes didaftarkan di Mahkamah Majistret Shah Alam sebagai kes komital No.: 81-7-2006.

2. Kes disebut di Mahkamah Majistret Shah Alam di hadapan Puan Suriyanilakma bt Abd. Kadir pada 30/11/2006 di dalam kehadiran TPR Puan Samihan Bt Rhazali dan tertuduh sendiri. Pada ketika ini tertuduh tidak diwakili oleh mana-mana peguam. Pertuduhan dibaca dan diterangkan kepada tertuduh. Tiada pengakuan yang direkodkan. Majistret menetapkan tarikh sebutan sekali lagi di hadapan beliau pada 22/1/2007 atas alasan 'sebutan untuk mendapatkan lapuran kimia'.

3. Pada 8/12/2006 rekod prosiding kes ini dipanggil oleh Y.A. Hakim Utama untuk semakan dibawah seksyen 323 Kanun Tatacara Jenayah melalui kes semakan No: MTJ(1) 43-18-2006. Semakan telah dijalankan di dalam kehadiran TPR Tuan Azar Irwan bin Moh. Ariffin dan tertuduh sendiri (tertuduh masih tidak diwakili). Melalui semakan ini Perintah Majistret yang menetapkan tarikh sebutan sekali lagi di hadapan beliau pada 22/1/2007 telah diketepikan. Penghakiman penuh bertulis telah dibaca di Mahkamah Terbuka dan dibekalkan kepada pihak TPR.

4. Pada tarikh yang sama (8/12/2006) rekod asal kes No: 81-7-2006 tersebut dikembalikan kepada Majistret berkenaan bersama-sama dengan sesalinan Perintah semakan bertarikh 8/12/2006 dan sesalinan Penghakiman berkaitan untuk pertimbangan semula Majistret terbabit.

5. Berikutan itu kes ini telah disebut semula di hadapan Majistret tersebut pada petang hari yang sama (8/12/2006) di dalam kehadiran tertuduh dan TPR Puan Samihan Rhazali sekali lagi.

6. Minit prosiding di hadapan Majistret pada petang 8/12/2006 tersebut adalah seperti berikut:

DPP : Samihan

OKT : Hadir.

DPP : Pohon dibacakan semula pertuduhan dikemukakan sebagai (P1).

OKT : PBTF (Pertuduhan dibacakan, diterangkan dan difahami).

DPP : Izin dikemukakan untuk pindah ke Mahkamah Tinggi sebagai (P2).

Court : Kes dipindahkan ke Mahkamah Tinggi.
(S) 5/1/2007.

t.t.
Pn. Suriyanilakma Bt Abd. Kadir
4.00 petang.

7. Justeru itu, sejurus selepas prosiding tersebut kes ini telah di 'transmit' ke Mahkamah Tinggi Shah Alam dan telah diterima dan didaftarkan pada hari yang sama (8/12/2006) sebagai kes perbicaraan Jenayah No: MTJ(1) 45-123-2006.

8. Sebagaimana yang telah ditetapkan oleh Majistret berkenaan kes ini telah disebut di Mahkamah Tinggi Jenayah (1) di hadapan YA Hakim Utama pada 5/1/2007 di dalam kehadiran TPR Tuan Azar Irwan, peguam tertuduh Encik Hashim bin Ibrahim dari T/n Tabian Tahir & Co. (lantikan sendiri) dan tertuduh sendiri. TPR telah mengemukakan pertuduhan yang ditandakan sebagai P1. P1 telah dibaca, diterangkan dan difahami oleh tertuduh. Tertuduh minta dibicarakan. Berikutan itu tarikh perbicaraan kes ini telah ditetapkan pada 7 hingga 11/4/2008.

Sekian, untuk pertimbangan Y.A. jua.

t.t.
Rofiah Binti Mohamad
Timbalan Pendaftar MTJ(1)
7/2/2007.

[4] The Public Prosecutor, obviously dissatisfied with the order made by me in *PP v. Marwan* on 8 December 2006 had directed the DPP Nik Suhaimi bin Nik Sulaiman to henceforth file notice of appeal as well as write (undated) letters requesting for a Revision of all cases wherein the accused are charged for an offence under s. 39B DDA and the magistrates transmit the case to the High Court without acceding to the request of the DPP to remand the accused until the written consent of the DPP to charge the accused for an offence under s. 39B is produced before the magistrate, immaterial of how long it may take to obtain and tender such consent. A notice of appeal dated 13 December 2006 was filed in the High Court in respect of the order of the Magistrate Shah Alam in case No. 81-8-06. The notice of appeal reads:

ADALAH DIBERI NOTIS bahawa PENDAKWA RAYA sebagai Perayu yang disebut di atas tidak berpuas hati terhadap perintah MEMINDAHKAN KES KE MAHKAMAH TINGGI yang diputuskan oleh Puan Majistret, Mahkamah Majistret Shah Alam, Puan Suriyanilakma binti Abd. Kadir pada 06.12.2006 berhubung dengan kesalahan yang boleh dihukum di bawah seksyen 39(B)(1) Akta Dadah Berbahaya 1952 dan dengan ini merayu kepada Mahkamah Tinggi terhadap Perintah tersebut.

Bertarikh pada 12 Disember 2006

(Nik Suhaimi bin Nik Sulaiman)
Timbalan Pendakwa Raya
Selangor

[5] In respect of the same matter by letter dated 12 December 2006 Nik Suhaimi bin Nik Sulaiman in his capacity as Ketua Unit Pendakwaan, Selangor requested for a revision of the magistrate's order in respect of which he had filed a notice of appeal!.

[6] The following is a list of cases as at 6 February 2007 in respect of which DPP Nik Suhaimi bin Nik Sulaiman has written to the judge, High Court, Shah Alam requesting for a revision of the respective orders of the magistrate transmitting the case to the High Court.

As At 6/2/2007

Magistrate Court Case No.	High Court Case No.	Date Undated Letter Received From Ketua Unit Pendakwaan	Date Timbalan Pendaftar Replied
(1) Mah. Majistret Klang MA2-81-41-2006 PP v. Muhd Ali bin Husen	45-134-06	23/1/2007	25/1/2007
(2) Mah. Majistret Klang MA2-81-29-2006 PP v. Ismadi bin Muhammad	45-6-2007	24/1/2007	25/1/2007
(3) Mah. Majistret Klang MA3-81-1-2007 PP v. (1) Mohd Azri b. Mohamed Yunus (2) Dain Azman b. Abd Ghani	45-17-2007	24/1/2007	25/1/2007
(4) Mah. Majistret Klang MA3-81-32-2006 PP v. Teuku Nawardi b. Syamsuar	45-20-2007	23/1/2007	25/1/2007
(5) Mah. Majistret Klang MA3-81-34-2006 PP v. Teh Kian Chye	45-21-2007	23/1/2007	25/1/2007
(6) Mah. Majistret Ampang M2-81-11-2006 PP v. Low Kim Yee	45-25-2007	24/1/2007	25/1/2007
(7) Mah. Majistret Klang M2-81-16-2006 PP v. Barni bin Ali	45-27-2007	24/1/2007	25/1/2007

(8) Mah. Majistret Ampang M2-81-17-2006 PP v. Azhar bin Che Abdullah	45-28-2007	24/1/2007	25/1/2007
(9) Mah. Majistret Ampang M2-81-18-2006 PP v. Yuvarajan a/l Govindasamy	45-29-2007	24/1/2007	25/1/2007
(10) Mah. Majistret Klang MA3-81-2-2007 PP v. Punavesvaran a/l Kesavan	45-33-2007	30/1/2007	NOT REPLIED YET (Fixed for revision on 9/2/2007)
(11) Mah. Majistret Klang MA3-81-26-06 PP v. Abdul Salam bin Afan	45-35-2007	30/1/2007	NOT REPLIED YET (Fixed for revision on 9/2/2007)
(12) Mah. Majistret Ampang MA2-81-3-2007 PP v. (1) Amri b. Ibrahim (2) Musliandy b. Alamshah	45-38-2007	31/1/2007	NOT REPLIED YET (Fixed for revision on 9/2/2007)
(13) Mah. Majistret Shah Alam MA 81-1-2007 PP v. Zaidi b. Zainal Abidin	45-4-2007	5/2/2007	NOT REPLIED YET (Fixed for revision on 9/2/2007)

[7] The contents of the undated letters are identical to that quoted above except as to the particulars of the accused and the charge under s. 39B DDA. The Timbalan Pendaftar has responded, in almost identical terms as the reply dated 25 January 2007 reproduced above, to 9 of the 13 cases listed above. Since DPP Nik Suhaimi bin Nik Sulaiman persists in continuing to write unabatedly for revision, notwithstanding the negative response by letter to such requests, it behoves me to call up in open court the 4 cases in respect of which the Timbalan Pendaftar has not responded by letter yet to Nik Suhaimi, by listing them for Revision today.

[8] I have considered each of the 4 cases very carefully including the original record of the proceedings before the magistrate as well as the contents of the letters of DPP Nik Suhaimi. The application for revision is without merit, as the 4 cases transmitted by the magistrate, just like the 9 other cases on the list above, have been registered for trial in the High Court, Shah Alam and are proceeding in accordance with the law before the respective judges assigned to hear them.

[9] It is with regret that I place on record my knowledge that DPP Nik Suhaimi bin Nik Sulaiman will continue to write to the judge High Court for revision unless the magistrates comply with the request of the DPP not to transmit the case to the High Court until the consent by the DPP to prosecute is tendered to the magistrate. The 13 cases listed above is ample evidence of the strategy adopted by the DPP to achieve his objective – a clear attempt to intimidate and harass, with letter after letter as well as notice of appeal.

[10] I take this opportunity to expressly state that when any notice of appeal is filed by the DPP in respect of any decision by a magistrate transmitting a case to the High Court, the magistrate shall not waste his or her time writing any grounds of decision and preparing a record of appeal. The notice of appeal shall be brought up before me in the presence of the DPP as soon as possible and shall be summarily disposed off.

[11] The order of transmission by a magistrate under s. 41A DDA does not fall within the definition of "decision" under s. 3 of the Courts of Judicature Act 1964 as the order does not finally dispose off the rights of the parties and therefore shall not be subject of an appeal.

[12] The contents of the letters for revision appears to be an attempt to impress upon me that the Public Prosecutor is in full control and has absolute power over the fate of an accused even when the Public Prosecutor is not ready to frame a charge by reason of the absence of a chemist report in his hands and that the courts have no say in this matter. Never mind the constitutional rights and fundamental rights of the accused. As far as the Public Prosecutor is concerned the magistrate must remand the accused even if the Public Prosecutor is not certain (after the expiry any period of legitimate remand to complete investigations) of the nature of the substance in the possession of the accused! After all, the Public Prosecutor can only issue the consent to prosecute after sight of the chemist report. As far as the Public Prosecutor is concerned it is of no consequence if the chemist takes six months or one year to make his analysis and furnish his report to the Public Prosecutor. In the meantime, because the Public Prosecutor says so, the accused must be remanded by the magistrate with a baseless charge under s. 39B DDA at this point of time and the threat of a death penalty hanging over his head. The Public Prosecutor says the accused cannot be discharged and released by the magistrate.

[13] Now, what is so wrong in the magistrate discharging the accused under s. 29 CPC if the chemist report is not available to the Public Prosecutor and the Public Prosecutor charging the accused subsequently only when the chemist has ascertained the nature of the alleged substance in the possession of the accused? The Public Prosecutor has a legal and moral duty not to frame any charge under s. 39B DDA or for that matter any other section of the said DDA if he is not in a position to ascertain the nature of the substance in the possession of the accused at the time the accused is first produced and charged before the magistrate. In any event, it is always open to the police in an appropriate case to invoke powers of preventive detention under the Dangerous Drugs (Special Preventive Measures) Act 1985 (Act 316). Section 3 and s. 6 of Act 316 provides as follows:

3. Power to detain suspected persons

(1) Any police officer may, without warrant, arrest and detain, for the purpose of investigation, any person in respect of whom he has reason to believe there are grounds which could justify his detention under subsection (1) of section 6.

(2) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under subsection (1) of section 6:

Provided that:

(a) he shall not be detained for more than twenty four hours except with the authority of a police officer of or above the rank of Inspector;

(b) he shall not be detained for more than forty eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent of Police;

(c) he shall not be detained for more than fourteen days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf and the Inspector-General or police officer so designated by him, as the case may be, shall forthwith report the same to the Minister.

(3) The police officer making an investigation pertaining to a person arrested and detained under this section shall cause a copy of the complete report of the investigation to be submitted:

(a) to an Inquiry Officer appointed under subsection (1) of section 5; and

(b) to the Minister,

within such period as may be prescribed by the Minister by regulations made under this Act.

6. Power to order detention and restriction of persons

(1) Whenever the Minister, after considering:

(a) the complete report of investigation submitted under subsection (3) of section 3; and

(b) the report of the Inquiry Officer submitted under subsection (4) of section 5,

is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drug the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a "detention order") direct that such person be detained for a period not exceeding two years.

[14] I wish to make it clear that if the learned DPP concerned continues to write in for a revision of any decision or order made by a magistrate consistent with the *ratio decidendi* of this court in *Marwan*'s case without the DPP first pursuing in the proper forum to successfully reverse the said decision, I may be compelled to issue a show cause notice to the said DPP as to why he should not be punished for contempt. Any attempt to harass and intimidate magistrates with futile letters to the High Court to have a decision or order of a magistrate revised, will not be tolerated and would be considered contemptuous.

[15] I reproduce from my judgment in *PP v. Toha bin M. Yusuf and 3 Others* ([2006] 2 CLJ 800 and [2006] 4 MLJ 63) so much as is relevant to the present revision proceedings.

> Now, having disposed off the case, I feel obliged to rule whether the transmission of the case by the Magistrate, on 16/12/05, to the High Court is a nullity, because the consent of the public prosecutor to institute a prosecution under s. 39B had not been tendered to the Magistrate at any time, right from the first appearance of the accused before him on 7/5/04, till the date of transmission on 16/12/05.
>
> I shall first direct attention to s. 39B(3) and (4) Dangerous Drugs Act which read:
>
> > (3) **A prosecution** under this section **shall not be instituted** except by or with the consent of the Public Prosecutor;
> >
> > Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case **shall not be further prosecuted until the consent has been obtained.**
> >
> > (4) When a person is brought before a Court under this section before the Public Prosecutor has consented to the prosecution the charge shall be explained to him but he shall not be called upon to plead, and the provisions of the law for the time being in force relating to criminal procedure shall be modified accordingly. (emphasis added)
>
> When is the prosecution instituted within the meaning of s. 39B(3) Dangerous Drugs Act? Section 26(1) and (2) of the Prevention of Corruption Act 1961 is identical to s. 39B(3) and (4) Dangerous Drugs Act. The Federal Court, in *Perumal v. Public Prosecutor* [1970] 2 MLJ 265 at 268 said:

A We agree with Dato' Marshall that the point of time for the institution of prosecution within the meaning of section 26 of the Act is the moment at which the court asks the accused to plead to the charge.

Dato' Marshall cites the following cases:

B *John Brooks & William Gibson; Thorpe v. Priestnall; Beardsley v. Giddings; Brooks v. Bagshaw; Ng Yan Pee v. Public Prosecutor; Haji Mohamed Paiman v. Public Prosecutor.*

We agree that in the light of the above authorities a C prosecution is normally instituted when a complaint is laid or an arrest made. This was laid down as far back as in 1847 by John Brooks & William Gibson, supra. This was a prosecution for night poaching by armed ...

But we agree that the proviso to subsection (1) and the D new subsection (2) of section 26 of the Act limit the meaning of the phrase "institution of prosecution" and for the purposes of this section a prosecution is instituted when the accused is called upon to plead to the charge. In other words, irrespective of what happened prior to that stage, **there must be a consent of the Public Prosecutor when** E **the accused is called upon to plead.**

But we agree with Dato' Marshall that where the **Public Prosecutor** or his **deputy prosecutes from the inception** under the provisions of the Act **there is necessarily an implied consent to the prosecution,** but where he does F not do so and yet the accused is called upon to plead, **consent** by the Public Prosecutor **given subsequently does not validate the institution** of the prosecution **unless** the court is satisfied that he or a colleague has **in fact given** such consent **prior to the moment of plea.** (emphasis added)

G The offence of trafficking under s. 39B(1) Dangerous Drugs Act punishable with death under s. 39B(2) is certainly an offence triable exclusively by the High Court and, therefore, in law, no subordinate court can call upon an accused to plead to the charge. Naturally and logically, H therefore, s. 41A(1) Dangerous Drugs Act provides, in very explicit terms, that in respect of an offence triable exclusively by the High Court, the accused person shall be produced before the appropriate subordinate court, which shall, after the charge has been explained to him, transmit I the case to the High Court, and cause the accused person to appear or brought before such Court, as soon as may be practicable. Section 41A(1) Dangerous Drugs Act reads:

Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

In view of the Federal Court decision in *Perumal v. Public Prosecutor, supra,* as to the meaning of the phrase "institution of prosecution" vide subsection (1) and the new subsection (2) of section 26 of the Prevention of Corruption Act 1961, which is identical to subsection (3) and subsection (4) of section 39B of the Dangerous Drugs Act 1952, a prosecution is instituted within the meaning of s. 39B(3) Dangerous Drugs Act only when the accused is called upon to plead to the charge. However, there must be a consent of the Public Prosecutor when the accused is called up to plead, irrespective of what happened prior to that stage. Therefore, in respect of a charge under s. 39B(1) Dangerous Drugs Act the question of obtaining the consent of the Public Prosecutor at the stage, immediately prior to the transmission, is a "non-issue", as the accused cannot be called up to plead to the charge at that stage. A prosecution for an offence under s. 39B(1) is instituted only when the accused is called to plead to the charge in the High Court. An accused person can only be called to plead to the charge when he appears at the High Court pursuant to the provisions of s. 41A(1) Dangerous Drugs Act. When the accused is produced in the High Court, upon the case being transmitted pursuant to s. 41A(1) Dangerous Drugs Act, the question of any consent (written or oral) of the Public Prosecutor to institute a prosecution under s. 39B is academic, as his deputy always appear personally in the High Court, and thus, there is necessarily an implied consent to the prosecution (see *Perumal v. PP, supra*).

The provisions in the proviso to s. 39B(3) Dangerous Drugs Act relating to the remand in custody of a person arrested, notwithstanding that a consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, and the last 11 words "shall not be further prosecuted until the consent has been obtained.", must be read in its proper context and in conjunction with

s. 31B Dangerous Drugs Act and s. 117 Criminal Procedure Code, relating to the procedure where investigation cannot be completed within twenty-four hours by an officer of customs or a police officer. The said last 11 words cannot be interpreted to authorize customs officers and police officers, effecting arrest of any persons for an alleged offence under s. 39B(1) Dangerous Drugs Act, to remand in custody any person indefinitely, on the purported ground or pretext that the consent of the Public Prosecutor has not been obtained. Such detention would lead to abuse and mal-practices by customs and police officers effecting arrest of any person for an alleged offence under s. 39B(1) Dangerous Drugs Act, and deny an accused person, arbitrarily, his fundamental right to a speedy and just trial in the court of competent jurisdiction. Section 31B Dangerous Drugs Act and s. 117 Criminal Procedure Code make it clear that the magistrate can only authorize detention in custody, from time to time, of any person arrested by the customs or police, for a term not exceeding fifteen days in the whole, from the date of the arrest. It would be a complete abuse of the law if the last 11 words of the proviso to s. 39B(3) Dangerous Drugs Act is read and interpreted to enable, to authorize and legitimize detention in custody of any person by the customs or police until the consent of the Public Prosecutor is obtained, notwithstanding the expiration of any period of lawful detention authorized by a magistrate under s. 31B Dangerous Drugs Act or s. 117 Criminal Procedure Code.

Section 31B Dangerous Drugs Act reads:

> (1) Whenever any person is arrested and detained in custody by an officer of customs for an offence against this Act, it appears that the investigation cannot be completed within a period of twenty-four hours from the time that the person is arrested, any officer of customs may produce such person before a Magistrate and the Magistrate may, whether he has or has no jurisdiction to try the case, from time to time, authorize the detention of such person in such custody as such Magistrate thinks fit for a term not exceeding fifteen days in the whole.
>
> (2) If the Magistrate acting under sub-section (1) does not have jurisdiction to try the case and considers further detention unnecessary, he may order such person to be produced before a court having such jurisdiction, or, if the case is triable exclusively by the High Court, before himself or any Magistrate having jurisdiction with a view to transmitting the case for trial by the High Court.

(3) Nothing in this section shall be construed in any manner derogating from the provisions of section 117 of the Criminal Procedure Code in its application in any case of an offence against this Act where the investigation is made by a police officer.

Section 117 Criminal Procedure Code reads:

(i) Whenever any person is arrested and detained in custody and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 28 and there are grounds for believing that the accusation or information is well founded the police officer making investigation shall forthwith transmit to a Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case and at the same time produce the accused before such Magistrate.

(ii) The Magistrate before whom an accused person is produced under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such magistrate thinks fit for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case and considers further detention unnecessary he may order the accused person to be produced before a magistrate having such jurisdiction or, if the case is triable only by the High Court, before himself or another magistrate with a view to committal for trial by the High Court.

(iii) A magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

Section 28 Criminal Procedure Code reads:

28. How person arrested is to be dealt with and detention for more than twenty-four hours

(i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court.

(ii) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.

A

> (iii) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty- four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

B

The order for transmission of a case by a magistrate, under s. 41A(1) Dangerous Drugs Act, is a judicial act, statutorily authorized. The last 11 words of the proviso to s. 39B(3) Dangerous Drugs Act cannot be read and judicially interpreted in a manner that would interfere and obstruct the said judicial function of the magistrate under s. 41A(1) Dangerous Drugs Act.

C

The last 11 words of the proviso to s. 39B(3) Dangerous Drugs Act are salutary and for compliance by customs and police officers effecting arrest of any person for an alleged offence under s. 39B(1) Dangerous Drugs Act. Customs and police officers should act responsibly, fairly, and with a sense of urgency, to determine,

D

within any lawfully authorized period of detention of any person granted by a magistrate under s. 31B Dangerous Drugs Act or s. 117 Criminal Procedure Code, whether on the evidence available, the institution of a prosecution under the said section 39B(1) Dangerous Drugs Act, is warranted. Thereafter, the

E

customs/police should, accordingly, frame the charge, with the consent of the Public Prosecutor, to set in motion the process for transmission to the High Court, without delay. This ought to be achieved, at the latest, immediately upon the expiry of the period of detention granted by a magistrate under s. 31B Dangerous Drugs Act or s. 117 Criminal Procedure Code, to enable

F

investigations to be completed. With modern day technology, communication between the customs/police and the Public Prosecutor to get the required consent, to frame a charge for an offence under s. 39B(1) Dangerous Drugs Act, can be instantaneous.

G

With respect, I do not agree with my brother Judge, Edgar Joseph Jr. J. (as he then was), in *Public Prosecutor v. Oladotun Lukmaru Umaru & Ors* [1991] 1 MLJ 187 at 188 when he said:

H

> In my view when a magistrate makes an order for transmission under s. 41A(1), that event although a judicial event, is a further step in the prosecution of the accused. It follows that that further step is barred until and unless the prior consent of the public prosecutor has been obtained.

I

It is inconceivable, that in our system of the administration of justice, the Public Prosecutor can be allowed to control the judicial function of a Magistrate to transmit a case exclusively triable in the High Court, by barring the transmission, in the absence of a

prior consent from him. I must emphasize again, that the judicial power of transmission is statutorily vested upon a Magistrate under s. 41A(1) Dangerous Drugs Act, and that power cannot be frustrated by introducing a condition precedent that must be satisfied for its exercise, unless expressly provided in the Act.

"Requisition" of the Public Prosecutor and "Consent" of the Public Prosecutor are two independent subject matters under the Dangerous Drugs Act. The one should not be confused with the other. The "Requisition" of the Public Prosecutor is only necessary for the purposes of a transmission of a case not within the exclusive jurisdiction of the High Court, that is, a case registered and scheduled for hearing either in the Sessions Court or Magistrates' Court but, nevertheless, the Public Prosecutor, in his wisdom, requires such a case to be tried in the High Court (see s. 41(1), 41(2) and 41A(1) Dangerous Drugs Act). For ease of reference the said s. 41(1), s. 41(2) and s. 41A(1) Dangerous Drugs Act reads:

> (41) (1) A Sessions Court or a Magistrates' Court presided over by a Magistrate of the First Class shall have jurisdiction to try any offence under this Act, except an offence under section 39B, and power to impose for any offence so tried the full punishment or penalty provided for that offence by this Act or by any regulations made thereunder, other than, in the case of a Magistrates' Court, imprisonment exceeding five years.
>
> (2) Notwithstanding the provisions of subsection (1), the High Court shall have jurisdiction to try any case in respect of any offence under this Act if the Public Prosecutor requires any such case to be tried by the High Court.
>
> 41A (1) Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.

The "Requisition" of the Public Prosecutor to try a case under s. 39B(1) Dangerous Drugs Act is irrelevant, and does not arise, because such a case cannot, in the first place, be registered and scheduled for hearing either in the Sessions Court or the

Magistrates' Court under s. 41(1) Dangerous Drugs Act as the said Courts have no jurisdiction to try it. Therefore, there never will be a situation for the Public Prosecutor to require it to be tried in the High Court, under s. 41(2) Dangerous Drugs Act. Instead, s. 41A(1) Dangerous Drags Act will come into operation, in an appropriate situation, and an order for transmission accordingly made by the Magistrate to set in motion the wheels of justice at the High Court, for the grave offence alleged against the accused by the customs or police. Such cases should not be seen to be hibernating at the Magistrates' Court, with the police, customs or some unseen hand having control over its fate, before a transmission to the High Court is effected. Magistrates should not be seen to have been manipulated, wittingly or unwittingly, in the transmission process, as would appear to be the position in the present case which was only transmitted to the High Court on the 16th appearance of the accused before the Magistrate. I wish to observe that the current practice of producing and tendering a "Requisition" by the Public Prosecutor in the High Court, immediately before the commencement of the trial of the accused for an offence under s. 39B(1) Dangerous Drugs Act, is meaningless, redundant and has no force of law.

For reasons already set out above, I rule that the prior consent of the Public Prosecutor is not an essential pre-requisite to effect a transmission by the Magistrate of a case triable exclusively by the High Court, pursuant to s. 41A(1) Dangerous Drugs Act. The transmission of the case before me by the Magistrate, on 16/12/05, is not a nullity for any jurisdictional error, by reason of the absence of the consent of the Public Prosecutor before the Magistrate. There has been an inordinate delay in the transmission of the case to the High Court, which delay is not sanctioned by the law. The order for transmission should have been made on the very first day the said charge was framed, read and explained to the accused (after the expiry of any lawful detention by the police under s. 117 Criminal Procedure Code), consistent with the unequivocal requirements of s. 41A(1) Dangerous Drugs Act.

[16] Finally, I reproduce below the grounds of my judgment in *PP v. Marwan bin Ismail* for ease of reference.

The record of proceedings before the magistrate Shah Alam on 30/11/06 was called and examined, pursuant to s. 323 CPC, upon my attention being drawn to a newspaper report dated 1/12/06, regarding an offence of trafficking in dangerous drugs, allegedly committed by the accused.

When the accused was first produced before the magistrate on 30/11/06, no plea was recorded by the magistrate in respect of the charge under s. 39B(1) of the Dangerous Drugs Act, 1952 (DDA), for the alleged offence of trafficking in 1980 gm of ganja on 20/11/06. However, the magistrate also did not transmit the case to the High Court and cause the accused person to appear or brought before the High Court, as clearly provided for under s. 41A DDA. Instead, the magistrate fixed the case for mention again, in the magistrate's court, on 22/1/07.

S. 41A DDA reads:

> (1) *Where any case* in respect of *an offence* under the Act *is triable exclusively by the High Court* or is required by the Public Prosecutor to be tried by the High Court, *the accused person shall be produced before the appropriate subordinate court which shall,* after the charge has been explained to him, *transmit the case to the High Court* without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, *and cause the accused person to appear or be brought before the Court as soon as may be practicable.*
>
> (2) When the accused person appears or is brought before the High Court in accordance with subsection (1), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.
>
> (3) The trial of a case transmitted to the High Court under subsection (1) shall be by a Judge of the High Court sitting alone, and the provisions of Chapters XXI and XXII of the Criminal Procedure Code shall not apply to such trial.
>
> (4) *The provisions of subsections (1), (2) and (3) shall have effect notwithstanding any other written law to the contrary* (emphasis added)

Upon examining the original record of proceedings of the magistrate, it is rather disappointing, to say the least, that the magistrate had hardly made any relevant record in clear terms, to justify, in law, the re-mention of the case before her on 22 January 2007 and thereby order the accused to be remanded in custody for a period of 2 months, from his date of his arrest.

The very brief notation by the magistrate, in the column for the reason for adjournment, on the first page of the charge sheet, after the date 22/1/07 is as follows:

> Sebutan untuk mendapatkan Laporan Kimia

A The record of proceedings do not show that there was any request from the DPP Samihah Ghazali not to transmit the case to the High Court because the chemist report was not available. The magistrate appears to have acted in a very mechanical manner in fixing a re-mention date. This is not a healthy judicial phenomenon and temperament. Magistrates should resist from B such temptations, however busy and pressured they may be in carrying out their duties for the day. The charge sheet does not appear to even carry a signature of the DPP or police officer who framed the charge!

C In deciding whether to transmit the case to the High Court, the magistrate should not be concerned with the chemist report. It is for the police and the Public Prosecutor to put their act together when charging an accused, after the police have completed their investigations, pursuant to any remand under s. 117 CPC. If the chemist report was not available to the police, how could the D accused have been charged, in the first place, for an offence under the DDA, without knowing the nature of the substance in his possession? The accused ought to have been released under s. 29 CPC.

E S. 29 CPC reads:

> No person who has been arrested by a police officer shall be released except on his own bond or on bail or under the order in writing of a Magistrate or of a police officer not below the rank of Inspector.

F It is clearly an abuse of the process of the law for the police/ Public Prosecutor to frame a charge, in the magistrate's court under s. 39B(1) DDA, and then detain the accused in custody at the "prosecution's pleasure", without transmitting the case to the High Court for trial, immediately after the accused is produced G before a magistrate and the charge read and explained to him, in accordance with s. 41A DDA. Such detention at the "pleasure of the prosecution" is unlawful and could expose the Government to a civil suit for damages.

H The warrant of remand issued on 30/11/06 is set aside and the mention date 22/1/07 for the accused to appear before the magistrate is also set aside. The Timbalan Pendaftar is directed to return the original record of proceedings to the magistrate.

I The accused is to be produced forthwith before the magistrate and the magistrate directed to re-consider whether to transmit the case to the High Court, pursuant to s. 41A DDA or to discharge the accused and release him under s. 29 CPC, after hearing submissions, if any, from the DPP and the accused.

I wish to make it very clear that the provisions of s. 259 CPC are not applicable and cannot be invoked, when an accused is produced before a magistrate upon a charge triable exclusively in the High Court, as the said proceedings for transmission under s. 41A DDA are neither an inquiry nor trial falling within the contemplation of s. 259 CPC.

S. 259 CPC reads:

> (i) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial the Court may, by order in writing, from time to time, postpone or adjourn the same on such terms as it thinks fit for such time as it considers reasonable and may, by warrant, remand the accused if in custody: provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding eight days at a time: provided further that where a Government Medical Officer had certified that a complainant will not be able to give evidence before a certain date the accused may be remanded until such date notwithstanding that the term of remand may exceed eight days.
>
> (ii) Every order made under this section by the Court of a Magistrate shall be in writing, signed by the presiding Magistrate, and shall state the reasons therefore.

[17] The order made by the respective magistrates in the four cases, namely Mahkamah Majistret Klang No: MA3-81-2-2007 *(PP v. Punavesvaran a/l Kesavan)*, Mahkamah Majistret Klang No: MA3-81-26-2006 *(PP v. Abdul Salam bin Afan)*, Mahkamah Majistret Ampang No: MA2-81-3-2007 (*PP v.* (1) *Amri bin Ibrahim* (2) *Musliandy bin Alamshah*) and Mahkamah Majistret Shah Alam No: MA81-1-2007 *(PP v. Zaidi bin Zainal Abidin)* transmitting the respective cases to the High Court for fixing a date of trial is correct and legal.